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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the Matter of	)	
Supplemental Advance Notice of Proposed Rulemaking	)	**Docket Numbers OST-97-2881; OST 97-3014; OST 98-4775**
Computer Reservations System Regulations 14 CRF 255	)	OST-97-2881-146 OST-97-3014-15 OST-98-4775-61

COMMENTS OF DEUTSCHE LUFTHANSA AKTIENGESELLSCHAFT IN RESPONSE TO SUPPLEMENTAL ADVANCE NOTICE OF PROPOSED RULEMAKING-COMPUTER RESERVATION SYSTEM REGULATIONS

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Deutsche Lufthansa Aktiengesellschaft ("Lufthansa") appreciates the opportunity to submit comments with respect to the supplemental advance notice of proposed rulemaking issued by the United States Department of Transportation (the "DOT") with respect to Computer Reservation Systems ("CRS") Regulations.

Current DOT CRS regulations were promulgated to regulate the practices of US and foreign carriers and ticket agents in order to prohibit unfair and deceptive practices and unfair methods of competition. The DOT's legal authority to regulate CRSs derives from (a) Section 41712 of the Aviation Code, 49 U.S.C. § 41712 (formerly Section 411), which authorizes the Department to regulate so as to address actual and potential "unfair," "deceptive" or anti-competitive practices in the "sale of air transportation" and (b) from the international obligations of the United States to provide an "fair and equal opportunity" for foreign airlines to compete in this country. Based on current circumstances in the CRS market, there is a sound basis for the Department to continue CRS regulation on both grounds.

The DOT began this particular rulemaking process by issuing an advanced notice of proposed rulemaking on September 10, 1997. Lufthansa submitted comments at that time, which are hereby incorporated by reference. Our position remains consistent with those comments

supporting the need to continue with CRS regulation. Lufthansa now addresses the primary issues raised by the DOT in its supplemental advance notice, namely, the effect of the reduced ties between the CRS systems and the airlines that have previously controlled them and the advisability of regulating airline distributions practices involving the Internet.

Lufthansa fully supports the DOT's efforts in ensuring that air travelers continue to benefit from a competitive air transportation industry with full access to accurate and comprehensive information with respect to the full range of available airline services. The rules have proven to be effective in promoting airline competition and preventing consumer deception and should be extended taking recent developments into consideration.

The Reduced Ties between the Systems and Airline Owners.

The CRS continues to play the key role in airline distribution, be it as a fully airline-owned distribution systems provider or as an independent system with few, if any, affiliations with airlines. Lufthansa believes that in order to promote airline competition and protect the consumer from deceptive practices, all parties involved in the distribution process should be subject to uniform regulation. This is the approach taken by the European Union Code of Conduct for Computer Reservation Systems [C. Reg. (EEC) No. 2299/89 as amended by C. Reg. (EC) No. 323/99] (the "EU Code"). The principles of the EU Code may, in our view, serve as the model for the US CRS regulations with respect to this issue. CRS Systems are global in nature and the harmonization of regulations promotes efficiency.

There are several proposals that Lufthansa would like to recommend with respect to the regulations themselves. It is suggested that the definition of CRS be amended in order to eliminate any distinction between a system that is operated independent of airline affiliation and one that is still airline owned or operated. The distinction in the regulations between CRS ownership by "air carriers" and "foreign air carriers" and "U.S. participating carriers" and "foreign participating carriers" should disappear. It is a fact that CRS systems operate on a global basis and the nationality of system owners should be ignored. Again, we wish to make reference to the definitions established in the EU Code for "computerized reservation system" and "subscriber" (see EU Code Article 2 (f) and (l) respectively). These definitions have worked well in the current CRS environment and would promote the DOT's objectives.

Lufthansa suggests a broader definition of "subscriber".

Travel agents, ticket agents, online agents/ Internet agents are all connected to a CRS, be it electronically and/or by contract, and should be categorized as users of or subscribers to the CRS. The essential element of the definition of a subscriber should hinge on the expectations that the travelling public has in receiving neutral and comprehensive travel information from a particular source.

The subscriber is an integral part in the distribution process and has the direct contact with the consumer. Lufthansa believes that a subscriber must be obligated to transmit the neutral information provided by a CRS in the same neutral manner to the consumer. In order to support this essential requirement the CRS should be required to include such an obligation as a standard clause in the subscriber agreements.

Today a subscriber has so many transactional options with its CRS that allow airline bias in availability and/or fares displays. Each CRS, however, also offers a primary (neutral) display. Today it is a common practice for CRS-subscribers to negotiate preferential rates/conditions with some airlines and thereafter employ in-house software to manipulate the neutral CRS-Information on fares and availability in order to follow those preferences. This widespread practice has the effect of discriminating against carriers and misleading the consumers. Therefore, a subscriber should be obligated to offer to its customers, as a default, neutral and comprehensive information unless the consumer requests otherwise.

The airline should definitely not be categorized as subscriber. As a member of the distribution process an airline is responsible for submitting data relating to schedules, availability and fares to the system vendors in a way which enable the systems to fulfill the neutrality requirements. A totally different issue is the manner by which airlines offer their information under their own name to the travelling public, directly or with the support of the Internet as shall be discussed in this commentary below.

Another issue to be considered at this time is the obligation, established pursuant to 14 CFR 255.7, that requires each system owner to participate in each other system. When the regulation was introduced and revised several years ago it was admittedly necessary in order to protect competition among airlines and among CRSs from display bias and discriminatory fees. The situation with respect to system ownership has changed and is acknowledged by the DOT. Owner-carriers have been losing control over CRSs' commercial decisions during the past years (see "Study on CRS

Charging Principles for the EC", SH&E, August 1995). This requirement now impedes competition among airlines and among CRSs and is not in the best interest of agents or consumers. Owner-carriers do not have the choice of negotiating their level of participation in CRSs and thus cannot effectively control their cost of distribution in the same manner as the non-owner-carriers. Functionally and commercially it is unwise for an airline today to participate in all CRSs in all markets at the same level. The costs resulting from this obligation continue to place owner-carriers at a competitive disadvantage with non-owners, without any benefit for the consumer of air travel. CRSs on the other hand do not have much incentive to optimize their agent-functions in home markets of major owner-carriers, because they are receiving the highest possible booking fees anyway, regardless of the quality of their products.

There are several reasons why the Department's current exercise of jurisdiction to regulate CRSs under the broad and remedial purposes of Section 411 should continue in place. First, as best evidenced by the Part 255 CRS rules that have been in place since 1992, a CRS does *not* need to be owned or controlled by an airline in order to come within the realm of Department jurisdiction; those rules apply by their plain terms to airlines that, directly or through an affiliate, "own, control, operate *or market*" a CRS. 14 CFR § 255.2 (emphasis supplied). The rules thus, quite appropriately, reach CRSs (such as Sabre) that may lack equity ties to airlines, but that have close commercial ties to airlines through marketing arrangements. In fashioning this rule under its Section 411 authority, the Department recognized that an airline could be in a position to influence a CRS to the extent that it has marketing ties with the CRS, a point more recently re-emphasized by the Department in its 1997 decision allowing parity clauses in CRS contracts to be enforced against an airline that "owns or markets a CRS." *See Computer Reservations System Regulations (Parity Clauses)*, 62 Fed. Reg. 59784, 59801 (Nov. 5, 1997) (recognizing that a CRS "might well choose to discriminate against competing systems in order to create a marketing advantage for the system that they own or promote."); 14 CFR § 255.6(e).

Second, the requirement that a CRS must be owned, controlled or marketed by an airline in order to fall within the reach of Department regulation under Section 411 continues to be met by each of the major CRSs operating in the United States. Amadeus remains primarily (60%) airline owned, in part by Lufthansa. It is also marketed by airline owned or airline affiliated entities in many nations. Worldspan remains fully airline owned. Galileo is significantly airline owned, with its largest shareholder being United Airlines. Galileo is also marketed by United Airlines under a

long-term arrangement between the two entities that also embraces technology support and other commercial ties. Finally, Sabre's ties to American Airlines remain strong by virtue of a marketing agreement and other commercial arrangements between the two. Sabre also has a marketing arrangement with Southwest Airlines. In short, while all but one of the major CRSs are at least in part owned by the public, it is clear that airlines continue to find it to be in their best commercial interests to maintain either close equity and/or marketing ties with CRSs, as well as other commercial ties. Accordingly, since no CRS lacks a close airline relationship, the question of whether DOT has statutory authority under Section 411 to regulate a CRS lacking any such relationships is a moot one.

Third, the proposition that the nature or degree of CRS regulation might depend on the nature or degree of airline affiliation, with unaffiliated CRSs presumably freed from all regulation, should be firmly rejected by the Department. This approach would quickly result in the domination of the CRS market by those unregulated CRSs that could, for example, offer discriminatory "better deals" in terms of booking and other fees to the largest carriers, effectively driving up CRS expenses for their competitors or potential new entrant airlines. The favored airlines could in turn use their market power (in the form of commissions and overrides) to induce travel agents to use the CRS that offers them a better deal, making it difficult or impossible for regulated CRSs to retain market share or otherwise remain viable competitors. Such unregulated CRSs could also design subscriber contracts that would foreclose other CRSs from effective competition, something now barred by Section 255.8 of the CRS rules. The inevitable dominance of the CRS market in the U.S. by one or perhaps two unregulated CRSs would disadvantage many airlines, likely including foreign airlines, drive up booking fees and plainly not serve the Department's pro-competitive aviation policy goals, including the remedial goals which Section 411 is designed to advance. For these reasons, and because such a regulatory change would be at odds with the international obligations of the United States discussed further below, the Department must continue to regulate all CRSs in the same manner.

Fourth, should the Department determine that it is appropriate to consider the question of whether it has authority under Section 411 to regulate a CRS that has no airline affiliations at all (notwithstanding that there are no such CRSs), it should conclude that it has the requisite authority to do so under Section 411. That statute is broadly worded to allow the Department to address any unfair, deceptive or anti-competitive practice by an airline or "ticket agent" in the "sale of air

transportation." DOT has previously determined that CRSs are an essential facility for airline competition in the marketing of air transportation.[1] The current CRS rules also reflect that CRSs are no less an essential tool for travel agents in their sale of such transportation. Were a CRS to offer biased displays or to engage in other discriminatory or unfair practices that might unfairly prejudice an airline or airlines over a competing airline, the Department's ability to satisfy its mandate under Section 411 would be thoroughly undermined. In these circumstances, DOT has an obligation to ensure that any CRS -- airline affiliated or otherwise -- provides non-biased displays and data, as required by the CRS rules. Stated differently, regulation of the essential competitive facilities provided by CRSs to the parties directly regulated under Section 411, airlines and ticket agents, is a necessary element of the Department's meaningful exercise of Section 411 authority.

Finally, the DOT has a regulatory obligation that devolves from bilateral aviation agreements that require the United States to provide foreign carriers a "fair and equal opportunity" to compete in the provision of air transportation. *See* 57 Fed. Reg. at 43791. The bilateral air services between the United States and Germany, like those between the United States and most other nations, secures such a right for Lufthansa in the United States, just as U.S. carriers have such rights in Germany.[2] As the Department recognized in its 1992 decision, regulation of CRSs to ensure unbiased displays and other fair practices is an essential element in the ability of the United States to fulfill its bilateral obligations in this connection.

Further, an amendment to the U.S.-Germany aviation agreement negotiated in 1996 contains specific provisions committing each nation to ensure fair and unbiased CRSs.[3] The agreement recognizes that:

quality of information about airline services available to travel agents who directly distribute such information to the travelling public and the ability of an airline to offer those agents competitive

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[1] *See* 57 Fed. Reg. at 43790.

[2] *See* Air Transport Agreement between the United States and Germany, entered into force April 16, 1956, reprinted at CCH Aviation Law Reports, ¶ 26,315a, section 8, as amended by 1996 Protocol.

[3] *See* Protocol Between the Government of the United States of America and the Government of the Federal Republic of Germany, May 23, 1996, Part III of Route Schedule, Principles of Non-Discrimination Within and Competition Among Computer Reservation Systems.

computer reservations systems (CRSs) represent the foundation for an airline's competitive opportunities and that:

it is equally necessary to ensure that the interests of the consumers of air transport products are protected from any misuse of such information and its misleading presentation and that airlines and travel agents have access to effectively competitive computer reservations systems.

To further these goals (which mirror the purposes of Section 411), the 1996 amendment provides, that CRSs must have integrated primary displays based on non-discriminatory criteria, that such criteria must apply equally to all participating carriers, and that CRSs are not only obligated, but "entitled" to operate in conformity with the CRS rules operative in each nation. It further requires that each nation "shall require that all distribution facilities that a system vendor provides shall be offered on a non-discriminatory basis to participating airlines;" that each nation shall not impose on a CRS of the other nation more stringent requirements than apply to its own CRSs and that designated airlines must participate in a CRS as fully in its homeland territory as it does in any system offered to agents in the other nation.

These various provisions of the bilateral agreement, no less than the obligation to provide a "fair and equal opportunity" for foreign carriers to compete in the United States, effectively obligate the United States not only to maintain CRS rules of the type now in place, but to apply those rules to all CRSs (regardless of the nature and scope of airline relationships) so as to ensure that the various non-discriminatory provisions of those rules can be satisfied in all cases. *See* 49 U.S.C. § 40105(b) (obligating the Department to regulate so as to "act consistently with obligations of the United States Government under an international agreement.") The United States could not fulfill its duties under this agreement, and many like agreements it has entered with other nations, if it were to weaken its rules or free some CRSs from regulation altogether.

Use of Internet for Airline Distribution.

We consider the Internet primarily to be an enhancement in communication between the members in the distribution process. It is "an increasingly important channel for airline distribution" which "intensifies communication between suppliers and consumers – without

intermediaries". The Internet in itself is not a new provider of distribution services. The Internet has not changed the distribution process or its members.

There are new and more direct information paths in the "pre-sale phase".

When it comes to airline bookings and tickets, however, we find the traditional setup still being used today. Consumer's booking and ticketing request must be handled:

- by a subscriber with the authority to issue tickets;
- by an airline directly; or
- by a CRS with capabilities of handling PNR- and ticketing data for subscribers and airlines.

From a consumer's point of view there are several options available on the Internet:

1. Website of a travel agency.

Traditionally the consumer expects that a travel agent will provide comprehensive and neutral advice regarding travel options and fares.

The online travel agencies such as Expedia and Travelocity are always subscribers to a CRS.

In order to protect airline competition and prevent consumer deception:

- the CRS should be obligated to make sure that their subscribers observe the neutrality rules and provide an unbiased display of flights and fares.
- the subscriber should be obligated to provide the consumer with comprehensive and neutral advice via the subscriber website.

Regulation should require all CRS subscribers, including those using the Internet, observe the neutrality rule.

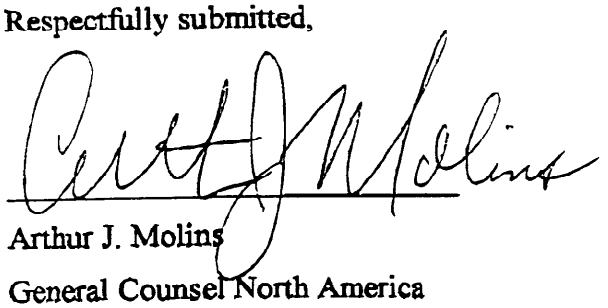
In evaluating current Internet travel sites of non-airline organizations it is evident that most offer selective information and do not meet the DOT's objectives. Regulation is necessary. The Department's unquestioned authority under Section 411 to regulate "ticket agents" in the sale of air transportation so as to preclude unfair, deceptive and anti-competitive practices plainly reaches to those ticket agents that operate exclusively over the Internet. The Department's July 24 request for supplemental comments in this proceeding correctly notes that the CRS Rules do not apply to the many purportedly neutral ticket agents that now operate over the Internet. The Department considered extending its rules to such sites in 1992, but concluded then that this activity accounted for a very small proportion of all airline bookings. Since that time, Internet use has grown dramatically and this growth is likely to continue since Internet distribution reduces airline costs, as

detailed in the Department's July 24 request for comments. Further, some of these websites on which consumers rely for unbiased information are owned by CRSs, which in turn have relationships with airlines – e.g., one of the largest sites, Travelocity, is owned by Sabre, which has marketing and commercial ties to American. Further, websites that are owned and operated as joint ventures of airline groups are on the verge of entering the market and are likely to assume an important market share. Thus, a large and growing number of consumers will continue to rely on what they reasonably assume will be the fairness and objectivity of websites that purport to provide neutral information on which consumers base travel decisions, but which in some cases have airline ownership or other affiliations which may not be known to the consumers and which could provide an incentive for the website to favor one airline over another. In this setting, the Department should exercise its authority to prevent the dissemination to consumers of data that may be biased. Such consumers, having chosen to forego the use of a professional travel agent, require protection from bias to no less degree than do the agents that use traditional CRS displays. As the Department has recognized in the past, Section 411 authorizes it to reach deceptive and anti-competitive practices at the outset. The Department should act here by extending CRS-type anti-discrimination rules to Internet agency sites so that deceptive and anti-competitive practices do not develop.

2. Website of an airline.

The expectations of a consumer entering an airline website or an alliance website are much different than upon entering an agency site. In those instances involving airline or alliance sites, the consumer will have the clear impression, (which impression should be properly maintained) that it is in an airline or alliance environment promoting the services of that particular airline or alliance. Consequently, an airline or alliance website should not be regulated.

Respectfully submitted,



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